

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

GERARDO MARQUINA,

Petitioner,

v.

3:08-cv-88

DONALD BAUKNECHT, Warden,

Respondent.

MEMORANDUM

This is a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner has paid the filing fee. The Clerk is **DIRECTED** to serve a copy of the petition and this Memorandum and accompanying Judgment Order on the respondent and the United States Attorney. However, for the reasons stated below, the respondent shall not be required to file an answer or other pleading to the petition, the petition will be **DENIED**, and this action will be **DISMISSED**.

Petitioner is challenging the sentence he received on his 1997 federal drug convictions. *United States v. Gerardo E. Marquina*, Criminal Action No. 2:94-cr-61 (E.D. Tenn. April 4, 1997) (judgment of conviction), *aff'd*, No. 97-5448, 1999 WL 55281 (6th Cir. Jan. 12, 1999) (unpublished opinion). He previously filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, which was denied. *Marquina v. United States*, Civil Action No. 2:00-cv-06 (E.D. Tenn. March 22, 2002) (final order).

Because petitioner is challenging a federal sentence, his remedy is to file a motion pursuant to 28 U.S.C. § 2255. Congress has decreed, however, that a district court cannot entertain a second or successive § 2255 motion without an order from the court of appeals authorizing the district court to consider a successive § 2255 motion. Petitioner has not sought such an order from the court of appeals. For that reason, petitioner has filed his petition under 28 U.S.C. § 2241, which concerns the power of the federal courts to grant writs of habeas corpus.

Absent exceptional circumstances, which are not present in this case, petitioner cannot use 28 U.S.C. § 2241 to circumvent the requirement for an authorization order from the court of appeals. *Charles v. Chandler*, 180 F.3d 753 (6th Cir. 1999). Accordingly, this court lacks jurisdiction to consider his petition and the petition will be **DENIED**. A certificate of appealability **SHALL NOT ISSUE** in this action. 28 U.S.C. § 2253(c).

In addition to the above, this court has carefully reviewed this case pursuant to 28 U.S.C. § 1915(a) and hereby **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this court will **DENY** the petitioner leave to proceed *in forma pauperis* on appeal. See Rule 24 of the Federal Rules of Appellate Procedure.

AN APPROPRIATE ORDER WILL ENTER:

s/ Thomas W. Phillips
United States District Judge